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Nos. 13-354 and 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, et al,
Petitioners,

v.

HOBBY LOBBY STORES, INC., et al,
Respondents.

CONSESTOGA WOOD SPECIALTIES CORP., et al,
Petitioners,

v.

KATHLEEN SEBELIUS, et al,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF *AMICI CURIAE* OF PROFESSOR EMERITUS OF LAW CHARLES E. RICE, PROFESSOR OF LAW BRADLEY P. JACOB, PROFESSOR OF LAW DAVID M. WAGNER, COMMON GOOD FOUNDATION, COMMON GOOD ALLIANCE, CATHOLIC ONLINE, LLC, THE TEXAS CENTER FOR DEFENSE OF LIFE, AND THE NATIONAL LEGAL FOUNDATION,

supporting Hobby Lobby, et al. and Conestoga Wood Specialties Corp., et al.

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QUESTION PRESENTED

The individual plaintiffs in these actions, the Hahns and the Greens, seek to operate their closely-held, family-run businesses consistently with their Christian faith. These plaintiffs, based on that faith, believe that abortion is morally wrong and contrary to their faith and also that to facilitate abortion by providing their employees with health insurance that covers abortifacient drugs and devices is morally wrong and contrary to their faith. The HHS mandate at issue in these cases subjects the Hahns' and the Greens' businesses to millions of dollars in penalties if the Hahns and the Greens do not direct their businesses to provide employees with health insurance that covers abortifacients. In effect, the mandate commands the Hahns and the Greens to do what their faith tells them is a sin or subject their businesses to substantial financial penalties. The question before this Court is the following: Does the HHS mandate impose a "substantial burden" on the Hahns' and the Greens' exercise of religion as that term is used in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) and in First Amendment jurisprudence.

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INTEREST OF *AMICI CURIAE*[1]

Charles E. Rice is Emeritus Professor of Law at Notre Dame Law School. Professor Rice has taught Constitutional Law and Jurisprudence and has written extensively on the constitutional and moral issues surrounding abortion and contraception. Professor Rice is concerned about the HHS mandate's attack on religious liberty and about a possible decision that would unduly restrict RFRA's protections.

Bradley P. Jacob is Associate Professor of Law at Regent University School of Law, specializing in Constitutional Law and religious liberty. From 1991 to 1993, Professor Jacob was Executive Director and CEO of the Christian Legal Society, which was a leading member of the Coalition for the Free Exercise of Religion during the legislative debates that led to the passage of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2012). Professor Jacob is concerned to see RFRA applied in a way that affirms RFRA's robust protection for religious liberty.

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[1] All parties have consented to the filing of this Brief. Blanket letters of consent from Counsel for several parties have been lodged with the Court. An individual letter of consent has been enclosed with the copies of this Brief for the remaining parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the Brief.

David Wagner is Professor of Law at Regent University School of Law and teaches and writes about constitutional law, including religious liberty. Professor Wagner is concerned that the HHS mandate that forces employers to provide insurance for contraceptives, abortifacients, and sterilizations despite the employers' religious objections unjustifiably attacks those employers' religious liberty. Professor Wagner is also concerned that to hold that the mandate does not substantially burden the plaintiffs' religious liberty unduly restricts the protection that RFRA provides for the free exercise of religion.

Common Good Foundation is a 501(c)(3) organization. Common Good Alliance is a 501(c)(4) organization. Founded by Keith A. Fournier, a Catholic apologist and constitutional lawyer, both organizations are informed by classical Christian social teaching and committed to building a culture of life, family, and freedom, while affirming classical Christian teaching, including that concerning religious freedom. Common Good Foundation and Common Good Alliance each have a Legal Defense Fund that provides legal advocacy and support in cases concerning the organizations' missions. To perform their missions, Common Good Foundation and Common Good Alliance rely upon a robust interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Common Good Foundation and Common Good Alliance are concerned that a decision rejecting the plaintiffs' claims in this case would unduly restrict the protection RFRA provides for religious liberty.

Catholic Online is a business that serves

Catholics and all people of good will by providing content over its integrated media network. Catholic Online operates its business in fidelity with the Catholic Church's teachings and is thus committed to building a culture of life, family, freedom, and solidarity. Catholic Online affirms classical Christian teaching, including that concerning religious freedom. Catholic Online's business mission depends upon a proper interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Catholic Online is concerned that a decision rejecting the plaintiffs' claims in this case would unduly restrict the protection RFRA provides for religious liberty.

Texas Center for Defense of Life (TCDL) is a 501(c)(3) organization that operates to defend human life, from conception to natural death, in both state and federal courts. TCDL serves persons, businesses, and non-profits to protect their rights of conscience on life-related issues. This case concerns the Plaintiffs' rights, as part of their religious liberty, not to violate their consciences on a life-related issue. TCDL believes the government's argument uncritically conflates the notion of "indirect" with "unsubstantial," as it relates to funding of abortifacient coverage forced upon Plaintiffs' businesses against their sincerely held religious beliefs.

The National Legal Foundation (NLF) is a public interest law firm dedicated to defending First Amendment liberties and restoring America's moral and religious foundation. The NLF and its donors and supporters are vitally concerned with these cases' outcome because of the impact this Court's

decision will have on religious business owners who seek to operate their businesses in accord with their faith, regardless of the business form chosen. The NLF counts such business owners among its donors and supporters.

SUMMARY OF THE ARGUMENT

This Brief makes two arguments that complement and amplify points the Plaintiffs in these actions make in their Briefs before this Court. First, the Brief argues that even though the HHS abortifacient coverage mandate technically applies to the corporate plaintiffs, Conestoga Wood Specialties Corporation, and Hobby Lobby, Inc. and Mardel, Inc., that mandate imposes a substantial burden on the religious exercise of the individual plaintiffs, the Hahns (who own and operate Conestoga) and the Greens (who own and operate Hobby Lobby and Mardel[2]), because they must direct the corporations they own and operate to provide the mandated coverage or subject their businesses to substantial penalties. Second, the Brief argues that the plaintiffs, based on commonly understood moral principles, could reasonably conclude that providing abortifacient coverage would be morally wrong and thus violate their faith and, moreover, that courts are incompetent to decide whether the plaintiffs have correctly concluded that complying with the HHS mandate would violate their faith.

As to the first argument, although the HHS mandate technically applies to the corporations that the Hahns and the Greens own and operate, the

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[2] For ease of reference, we will refer to Hobby Lobby and Mardel collectively as Hobby Lobby.

mandate imposes a substantial burden under RFRA on the Hahns and the Greens.[3] To assert otherwise ignores three basic points.

First, the corporations cannot provide abortifacient coverage to employees unless the Hahns and the Greens, who own and operate the corporations, direct the corporations to provide the coverage. The mandate thus effectively commands the Hahns and the Greens to direct their businesses to provide abortifacient coverage. Commanding the Hahns and the Greens to direct their businesses to provide abortifacient coverage is in effect no different than commanding the Hahns and the Greens to provide that coverage. That the corporate form shields these individual plaintiffs from corporate financial liability is irrelevant because the issue here is the Hahns' and the Greens' understanding that providing that coverage is immoral. That question turns on the Hahns' and the Greens' moral

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[3] As the standard for what constitutes a substantial burden under RFRA derives from this Court's cases defining a substantial burden under the Free Exercise Clause before the decision in *Employment Division v. Smith*, 492 U.S. 872 (1990), the HHS mandate would also impose a substantial burden on the Hahns and the Greens for purposes of the Free Exercise Clause. Your *Amici*, however, believe that no showing of substantial burden is even necessary to establish a Free Exercise clause violation because the HHS mandate is neither neutral nor generally applicable. *See, e.g., Hartman v. Stone*, 68 F.3d 973, 979 & n. 4 (6th Cir. 1995). That said, because this brief focuses on RFRA, the brief will demonstrate that the mandate substantially burdens the Hahns' and Greens' religious exercise under RFRA's standard.

responsibility for the acts they direct the corporations to undertake. The Hahns and the Greens can no more escape moral responsibility for directing their corporations to provide abortifacient coverage than a corporation's owner-operator can escape responsibility for directing corporate employees to kite corporate checks or an assassin can escape moral responsibility because, technically, his gun fired the fatal shot. The HHS mandate thus effectively commands the Hahns and the Greens to perform an act that they believe is immoral and violates their faith.

Second, the fact that the mandate technically imposes its penalties on the corporations is irrelevant. The mandate threatens substantial financial harm to corporations that the Hahns and the Greens own. If those corporations are harmed financially, the Hahns' and the Greens' investments in the businesses will be diminished (and possibly destroyed). Thus, to threaten substantial harm to the businesses is to threaten substantial harm to the Hahns and the Greens, the businesses' owners. Therefore, the HHS mandate directly coerces the Hahns and the Greens to violate their faith.

Third, RFRA prohibits the federal government from imposing "substantial" burdens on the exercise of religion. It is a commonplace that a threat to harm one person or entity can exert substantial pressure on another person to do something he would otherwise not do. Nobody would deny that the threat, "I'll kill your family if you do not kill the mayor" does not exert substantial pressure to comply with the demand even if one considers that pressure to be "indirect." Likewise, even if one characterizes as

indirect the pressure the HHS mandate imposes on the Hahns and the Greens in these cases—the threat of huge penalties being imposed on their businesses if they do not direct those businesses to provide abortifacient coverage—that threat imposes substantial pressure on these plaintiffs to act contrary to their faith. To argue that the mandate imposes no burden on the Hahns' and the Greens' exercise of religion because they conduct their businesses as corporations does nothing but obfuscate this common sense conclusion.

As to the second argument, the Hahns and Greens could reasonably conclude that providing abortifacient coverage to their businesses' employees is morally wrong and therefore contrary to their faith. If the Hahns and the Greens comply with the HHS mandate and direct their businesses to provide health insurance that specifically provides abortifacient coverage, the Hahns and the Greens would be acting intentionally to provide a fund for covered employees to pay specifically for abortifacients. Thus, the plaintiffs would be manifesting an intent to see that their employees would be able to pay for, and thus obtain (or more readily obtain), abortifacients (just as an employer who establishes a "Hitman Compensation Fund" that allows employees to withdraw money specifically to pay hired killers would be manifesting an intent to see that his employees would be able to pay for, and thus obtain, murder-for-hire services). That not all Christians might agree with, or that judges (or government attorneys) might not comprehend, the Hahns' and Greens' conclusion that complying with the HHS mandate would be morally wrong is irrelevant. This Court has made clear that courts are

not competent to determine whether a believer's understanding of what his faith requires is correct.

For employers like the Hahns and the Greens, who believe on religious grounds that abortion is morally wrong and that providing health insurance that covers abortifacients is morally wrong, the HHS mandate imposes a stark choice—violate your faith, or subject your businesses to enormous penalties. A holding that this choice imposes no substantial burden on the Hahns' or Greens' exercise of their Christian faith would not only be wrong; it would nullify the very protection that RFRA promises for the free exercise of religion.

ARGUMENT

I. INTRODUCTION

This case poses one fundamental question: May the federal government, without a compelling reason, impose a significant penalty on a business because the business's owners and operators refuse to direct the business to do something that they sincerely and reasonably believe violates their religious faith? The answer to that question must surely be, "No." The Religious Freedom Restoration Act provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the "least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000bb-1(a) & (b) (2012). A federal mandate that commands a person to violate his sincerely held religious beliefs (or, more bluntly, commands a person to sin) and threatens substantial financial harm to his business if he does not would seem to be the quintessential substantial burden on religious

exercise. That conclusion is consistent with this Court's precedent defining what constitutes a substantial burden on religious exercise for Free Exercise Clause purposes (and quite frankly, with common sense). *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (law requiring parents to send their children to school or face small fines and three-months imprisonment imposed a "severe" burden on Amish parents by "compel[ling] them to perform acts undeniably at odds with the fundamental tenets of their religious beliefs"); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) ("where a state conditions receipt of an important benefit upon conduct proscribed by religious faith . . . , thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a [substantial][4] burden on religion exists.")

The individual plaintiffs in these cases, members of the Hahn family and the Green family, are Christians who strive to direct their closely-held, family-owned-and-operated businesses, Conestoga and Hobby Lobby, in accord with their Christian faith. The Hahns and the Greens believe, based on

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[4] Whether a burden is substantial is, of course, a critical component of the analysis in this case. Your *Amici* do not insert the word "substantial" into this quotation a second time to stack the deck. Rather, that insertion is derived from the next sentence in *Thomas*. 450 U.S. at 718 ("Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith..., thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement on free exercise is nonetheless *substantial*.") (emphasis added).

their faith, that abortion is morally wrong. They also believe that they would violate their Christian faith—that is, they would sin—if they directed the businesses they own and operate to provide employees with health insurance that covers abortion-causing drugs and devices.

The Department of Health and Human Services, however, has promulgated a regulation requiring that employers (with exceptions not at issue here) provide their employees with health insurance that covers all Food and Drug Administration-approved contraceptive methods and sterilization procedures. Among the approved contraceptives are drugs and devices (Ella, Plan B, IUDs) that one can reasonably conclude act as abortifacients.[5] If the Hahns and the Greens follow their consciences and do not comply with the HHS mandate, their businesses will be subject to millions of dollars annually in financial penalties. Because the mandate would impose enormous penalties on Conestoga and Hobby Lobby if the Hahns and the Greens do not direct the companies to provide their employees with the HHS-mandated coverage, and because the Hahns and the Greens believe that to provide the coverage would violate their Christian faith, the HHS mandate imposes on the Hahns and the Greens a stark choice: Do what your consciences tell you violates your Christian faith—in other words, sin—or subject your family businesses, your means of livelihood, and the means of support for your employees, to substantial and possibly ruinous

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[5] *See* Michael Fragoso, *The Stealth Abortion Pill* (Aug. 17, 2010) http://www.thepublicdiscourse.com/2010/08/1515/ (last visited Jan. 20, 2014).

penalties. In the words quoted above from *Yoder* and *Thomas*, the mandate "compels [the Hahns and the Greens] to perform acts . . . at odds with the fundamental tenets of their religious beliefs" and puts "substantial pressure on [the Hahns and the Greens] . . . to modify [their] behavior and to violate [their] beliefs." If that does not substantially burden the plaintiffs' exercise of their faith under RFRA, then RFRA is meaningless.

But despite the penalties the HHS mandate imposes on businesses like Conestoga and Hobby Lobby should their owners and operators refuse to violate their faith, the district court in the *Conestoga* case concluded that the mandate imposes no substantial burden on the individual plaintiffs' exercise of their religion. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 411-15 (E.D. Penn. 2013) (order denying preliminary injunction). The Third Circuit affirmed this decision. *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 387-88 (3rd Cir. 2013). While purporting to accept that the Hahns are exercising their religion by refusing to provide health insurance covering abortifacients, *see Conestoga*, 917 F.Supp.2d at 416, the district court found the burden imposed on the Hahns to be insufficiently "direct" to constitute a *substantial* burden, *see id.* at 414-15.

The district court in *Conestoga* reached this startling conclusion in large part because "Conestoga's corporate form further separates the Hahns from the requirements of the [mandate]" in that the mandate "regulations apply only to Conestoga" *Id.* at 415. The Third Circuit echoed this analysis on appeal. *See Conestoga* 724 F.3d at 387-88

(relying on the principle that Conestoga Wood Specialties Corporation is a separate entity from its owners to conclude that the Hahns have no claim under the Free Exercise Clause or RFRA). The district court in *Conestoga* also noted the reasoning first set forth by the district court in *O'Brien v. United States Dept. of Health and Human Services*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012). The *O'Brien* court opined that the HHS mandate did not substantially burden a Catholic employer's exercise of his faith (a faith that led him to conclude that he could not provide health insurance covering contraception, abortifacients, or sterilizations) because the employer would have to subsidize those goods and services only "after a series of independent decisions" by covered employees and their health care providers. *Id.*; *see Conestoga*, 917 F. Supp. 2d at 415 (citing *O'Brien*).

But none of these purported reasons justify finding that the HHS mandate imposes no substantial burden on the Hahns' or the Greens' exercise of their faith. Even if insurance would pay for abortifacients only if employees decide to use the coverage to purchase abortifacients, the fact remains that the Hahns and the Greens sincerely believe that it would be inconsistent with their faith—that is, it would be a sin—to facilitate the use of abortifacients by *directing the corporations they own and operate* to provide employees coverage that provides the specific means to pay for abortifacients. Moreover, to say that any burden the mandate imposes on the Hahns and the Greens is too indirect to be substantial because the mandate technically requires the corporations to provide the objectionable coverage ignores the fact that the businesses can provide that

coverage only if these individual plaintiffs, as their businesses' owners and operators, direct the businesses to provide that coverage. Conestoga's or Hobby Lobby's "decision" to provide the coverage is thus *the Hahns' or the Greens'* decision to provide the coverage. And to say that the burden is too indirect to be substantial because the penalties technically fall on the corporations likewise ignores the relationship between the Hahns and the Greens and their businesses. These plaintiffs own Conestoga and Hobby Lobby; therefore, harming the corporations harms the Hahns and the Greens by putting their investment in these corporations at substantial risk (not to mention putting at risk their employees' jobs, which in itself would weigh heavily on anyone concerned with the welfare of his business's employees). The mandate's threatened penalties on Conestoga and Hobby Lobby thus operate to coerce *the Hahns and the Greens, who own and operate these businesses*, to violate their faith.

If one grants the Hahns' and the Greens' understanding of what their faith requires, the HHS mandate does not impose, to quote *O'Brien*, 894 F. Supp. 2d at 1158, an "insignificant or remote" burden on the exercise of that faith. Rather, by imposing substantial penalties on their businesses should the Hahns and the Greens decline to do what their consciences tell them is a sin, the mandate imposes substantial and direct compulsion on the Hahns and the Greens to violate their faith.

The district courts in *Conestoga* and *Hobby Lobby* purported to recognize that "it is not within a court's province to question a plaintiff's religious beliefs." *Conestoga*, 917 F. Supp. 2d at 412 (citing

approvingly *Hobby Lobby, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012)). Indeed, as the district court in *Hobby Lobby* stated, "it is not the province of the court to tell the plaintiffs . . . whether their beliefs about abortion should be understood to extend to how they run their corporations . . . or to decide whether such beliefs are fundamental to their belief system or peripheral to it." *Hobby Lobby*, 870 F. Supp. 2d. at 1293. But ultimately, the only way to find insubstantial the significant and rather obvious compulsion (millions of dollars in penalties every year on their businesses) that the HHS mandate places on the Hahns and the Greens to (in their view) sin is to refuse to countenance (despite any words to the contrary) the Hahns' and the Greens' understanding of what their faith requires; that is, to find the mandate's burden insubstantial requires one to question (and ultimately reject) the Hahns' and the Greens' conclusion that facilitating abortion by providing one's employees health insurance that covers abortifacients is morally wrong. Judge Rovner, in her dissent in *Korte v. Sebelius*, 735 F.3d 654, 717 (7th Cir. 2013) (Rovner, J., dissenting), bluntly expressed this skepticism: in her view, "what [plaintiffs who object to the mandate] are really objecting to is the private choices that employees and their families might make in reliance on healthcare coverage that includes contraceptive [and abortifacient] care." *See also, id.* at 706 (HHS mandate "does not require the owners themselves to do anything in violation of their religious faith.")

Perhaps Judge Rovner and other judges who have rejected other challenges to the HHS mandate find it difficult to understand that employers like the Hahns and the Greens could conclude that it is

morally wrong to make health insurance covering abortifacients available to employees who may or may not use that coverage. But this skeptical view proves too much. A religious belief need not be "comprehensible to others" to warrant protection. *Thomas*, 450 U.S. at 714. And this Court has made clear that courts are legally incompetent to determine whether a believer's understanding of what his faith requires is correct. *Id.* at 715-16.

This Brief will discuss in greater detail why the HHS mandate imposes a substantial burden on the Hahns' and Greens' religious exercise even though the mandate technically applies to Conestoga and Hobby Lobby. The Brief will proceed to explain why employers like the Hahns and the Greens who believe abortion is morally wrong could reasonably conclude that it would be morally wrong (that is, a sin) to provide health insurance covering abortifacients.[6] While some Christians might disagree with that conclusion, this Court admonished in *Thomas* that it is not the business of federal courts—including this Court—to decide whether people like the Hahns and the Greens correctly

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[6] Your *Amici* do not address this point necessarily to convince this Court that complying with the mandate would be morally wrong, because as we have noted and will expand upon further, it is not generally within a court's competence to determine whether a believer's understanding of his faith is correct. Rather, we address this point to demonstrate that the Hahns' and the Greens' understanding of their duty as Christians must be taken by courts to be both sincere and religious, *see Korte v. Sebelius*, 724 F. 3d 654, 683 (7th Cir. 2013); that is, their understanding is "not so bizarre . . . as not to be entitled to protection." *Thomas*, 450 U.S., at 715.

understand what their faith requires.

II. ALTHOUGH THE HHS MANDATE TECHNICALLY REQUIRES THE CORPORATE DEFENDANTS TO PROVIDE ABORTIFACIENT COVERAGE OR PAY PENALTIES, THE MANDATE EXERTS SUBSTANTIAL PRESSURE ON THE HAHNS AND THE GREENS, THE CORPORATIONS' OWNERS AND OPERATORS, TO ACT IN A WAY THAT VIOLATES THEIR FAITH.

It is true that the HHS mandate technically operates against the corporations the Hahns and the Greens own and operate, but to conclude from this that the HHS mandate does not substantially burden the Hahns' and the Greens' free exercise of religion would require one to ignore three basic points: First, because the Hahns and the Greens own and operate the corporations, for the businesses to provide the objectionable coverage, *the Hahns and the Greens* must act contrary to their faith by directing the businesses to provide the coverage. Second, because the Hahns and the Greens own Conestoga and Hobby Lobby, harming (or threatening to harm) the corporations harms (or threatens to harm) the Hahns and the Greens. Third, RFRA prohibits "substantial" burdens on religious exercise, not "direct" burdens. Harm threatened to X can impose substantial compulsion on Y to act in a way that he would not otherwise act so he can prevent the harm to X, even if one characterizes the compulsion on Y as "indirect."

A. For Conestoga and Hobby Lobby to provide abortifacient coverage, the Hahns and the Greens must direct those businesses to provide that coverage; the HHS mandate therefore effectively commands the Hahns and the Greens, contrary to their faith, to provide abortifacient coverage.

Although considered a "person" at law, a corporation cannot think or act on its own. A corporation can act only through its human agents and at the direction of those who have the responsibility to make decisions on its behalf and manage its affairs. Here, the people who have that responsibility for Conestoga are the Hahns, and for Hobby Lobby, the Greens. These corporations can provide their employees with health insurance that covers abortifacients only if *the Hahns* and *the Greens* direct these corporations to provide that insurance. In reality, any decision by Conestoga or Hobby Lobby to provide the HHS-mandated coverage would be a decision by the Hahns or the Greens to provide that coverage. The HHS mandate, therefore, while technically applying to the corporations, in reality commands *the Hahns* and *the Greens* to provide the mandated coverage. The mandate thus commands the Hahns and the Greens, under threat of substantial and likely ruinous penalties to their businesses, to perform an act their consciences tell them is a sin.

Despite the rather obvious proposition that a corporations cannot act unless human agents (here, the individual plaintiffs who own and operate Conestoga and Hobby Lobby) direct them to act, the

Third Circuit in *Conestoga* dismissed the Hahns' RFRA claims because, in the panel majority's view, "[t]he Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga*, 724 F.3d at 388; *see id.* at 389. But while the "advantages of the corporate form" may well include shielding the corporation's owners from corporate *financial* liabilities, those advantages do not include shielding the corporation's operators from moral responsibility for the acts they direct the corporation to perform. A simple example illustrates this. Suppose that Able, who owns and serves as President and Chairman of the Board of a closely-held corporation, directs corporate employees in the course of their employment duties to kite corporate checks to corporate creditors. It would be absurd to suggest that Able is not *morally* responsible for defrauding the corporation's creditors because it was the corporation, a separate entity, that technically kited the checks. Able, having directed the corporation to conduct the check kiting scheme, is morally responsible for the fraud; the corporation is the means he used to defraud the corporation's creditors.

Likewise, Conestoga and Hobby Lobby are the means by which the Hahns and the Greens act—and live out their Christian faith—in the commercial marketplace. Like Able, who used his corporation to defraud corporate creditors, the Hahns and the Greens, by directing Conestoga and Hobby Lobby to provide abortifacient coverage, would be using their corporations to facilitate abortifacient use by their employees. The Hahns and the Greens would no more be shielded from moral responsibility than

would Able.

Another analogy makes the point more starkly. To suggest that the Hahns and the Greens would not be morally responsible because, technically, their corporations would be providing abortifacient coverage makes no more sense than saying that an assassin is not morally responsible for murder because, technically, it was the gun he used that fired the fatal shot. For the assassin, the gun was an instrument, the means he used to achieve the end of killing his victim. Likewise, if the Hahns and Greens were to direct their businesses to provide abortifacient coverage, the Hahns and Greens would be using their corporations—corporations they control like the assassin controlled his gun—as the means to the end of providing abortifacient coverage to the corporations' employees. The Hahns and the Greens could no more escape moral responsibility for using their corporations as the means to accomplish what they believe to be an immoral end than the assassin can escape moral responsibility for using a gun to achieve his immoral end. Thus, by compelling the Hahns and the Greens to use their corporate businesses to accomplish what their faith informs them is an immoral end, the HHS mandate compels the Hahns and the Greens to act in a way that violates their faith.

At bottom, the Hahns' and the Greens' claim in these cases is that the HHS mandate coerces them to act in a way that their faith tells them is wrong by coercing them to direct their corporate businesses to provide abortifacient coverage to employees (and thus, in effect, to use these corporate businesses as the means to accomplish what their faith tells them

is an immoral end). Using a corporation as the means to accomplish an immoral end is no different than using any other separate object, be it a gun, a car, or another person, as a means to accomplish an immoral end. In any of these cases, the person who used the means would be responsible for the immoral end achieved. The corporate law principle that a corporation is a separate entity from its owners has nothing to say about the moral responsibility of those who direct the corporation to accomplish an immoral end. The separate entity doctrine thus does not clarify analysis; rather, it obfuscates. That Conestoga and Hobby Lobby are separate entities from the Hahns and the Greens provides only an excuse, not a reason, to find that the HHS mandate does not substantially burden the Hahns' and the Greens' exercise of their faith.

B. To threaten substantial harm to a closely-held, family-run corporation is to threaten substantial harm to the corporations' owners; thus, the HHS mandate directly coerces Conestoga's and Hobby Lobby's owners, the Hahns and the Greens, to violate their faith.

To conclude, as the district court did in *Conestoga*, and as the government argues, (*See* Brief for Kathleen Sebelius, *et al.*, in No. 13-354, at 27-29), that the HHS mandate does not impose a substantial burden on the individual plaintiffs' exercise of their faith because the threatened penalties would fall on the corporations also ignores the relationship between the Hahns and the Greens and their businesses. As explained above, the mandate operates to command the Hahns and the Greens, as

Conestoga's and Hobby Lobby's owners and operators, to do what they believe is a sin. Likewise, the means the mandate employs to compel the Hahns and the Greens to act—the threat of substantial and likely ruinous penalties on their businesses if they do not direct their businesses to provide the mandated coverage—applies direct pressure on the Hahns and the Greens. The value of the stock that the Hahns and the Greens own in their businesses, and thus, their financial well being, depend on their corporations' financial health. If that financial health suffers, it stands to reason that the owners' stock would be less valuable. And if these businesses suffer financial ruin—not a far-fetched possibility given that failing to provide the mandated abortifacient coverage would subject the businesses to millions of dollars in penalties every year—the stock could well be worthless.

The harm the HHS mandate threatens to Conestoga and Hobby Lobby if the Hahns and the Greens do not direct their businesses to provide abortifacient coverage is thus harm threatened to the Hahns and the Greens as well. The mandate's effective command—"sin or subject your business to substantial penalties"—thus can be reformulated as, "sin or subject the value of your holdings in your business to substantial diminution." The mandate in effect seeks to coerce the corporations' owners to act contrary to their faith by threatening them with financial harm. That is not an indirect, insubstantial burden on the Hahns' and the Greens' exercise of their faith; it is direct, substantial pressure on the Hahns and the Greens to do that which their consciences tell them is a sin.

C. RFRA prohibits "substantial" burdens on religious exercise; even if the burden the mandate imposes on the Hahns and the Greens is indirect, it is still substantial.

In any event, even if one characterizes as indirect the pressure the HHS mandate imposes on the Hahns and the Greens to violate their faith, nothing in RFRA suggests that such indirect pressure cannot violate RFRA. RFRA does not prohibit only "direct" burdens on religious exercise; RFRA prohibits "substantial" burdens, *see* 42 U.S.C. § 2000bb-1(a)(2012), and the burden the mandate imposes on the Hahns and the Greens, even if one characterizes it as "indirect," is still substantial.

There is no question that a threat to harm one person can exert substantial pressure on another person to do something he would otherwise not do. For example, suppose Baker tells Charlie, "I am holding your family hostage. If you do not kill the mayor, I will kill your family." Although the threatened harm—death—will fall on Charlie's family, it defies reality to suggest that the pressure the threat places on Charlie to kill the mayor is not substantial, even if one characterizes that pressure as "indirect." So it is with the pressure the mandate imposes on the Hahns and the Greens to direct their businesses to provide abortifacient coverage. Even if one considers that pressure to be indirect because Conestoga and Hobby Lobby are legally separate entities from their owners, it defies reality to suggest that the choice the mandate imposes on the Hahns and the Greens—sin or have substantial penalties imposed on the corporations that they founded, own,

rely on for their living, and rely on to provide employment to the businesses' employees—does not impose substantial pressure on the Hahns and the Greens to act in a way they believe violates their faith.

To hold that threatening harm to a corporation if the owners and operators do not operate the business in a way that violates their religious beliefs does not substantially burden the owners' religious exercise would lead to absurd results. Suppose the federal government were to enact a law requiring all food service businesses affecting interstate commerce to be open seven days a week or pay a fine.[7] This law would certainly impose a substantial burden on an Orthodox Jew who operates a deli as a sole proprietorship by forcing him either to open the deli on the Sabbath or pay a fine. *Cf. Sherbert v. Verner*, 374 U.S. 398, 403-05 (1963) (denying unemployment benefits to a Sabbatarian who refused to work on Saturdays imposed "unmistakable" pressure to violate Sabbatarian beliefs). But if the deli owner incorporated *the very same deli business*, the burden on the owner's religious exercise would be considered only indirect, and therefore not substantial, and therefore not sufficient to state a claim under RFRA.

That result is not only senseless; it also embodies a perverse reading of RFRA, a statute enacted to protect religious adherents from

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[7] This hypothetical is adapted from one proposed by Ed Whalen. *See* Ed Whalen, *Re: Another Crazy DOJ Stance Against Religious Liberty* (July 26, 2012), http://www.nationalreview.com/bench-memos/312422/re-another-crazy-doj-stance-against-religious-liberty-ed-whalen (last visited Jan. 20, 2014).

government-imposed burdens on the exercise of their faith. To deny RFRA's protection to religious adherents who incorporate their businesses is to tell those religious adherents that they will be protected from federally-imposed burdens on their ability to operate their businesses consistently with their faith only if they are willing to forego a form of business organization—incorporation—generally available to all other business owners. Forcing business owners to forego incorporation in exchange for receiving protection of their right to operate their businesses according to their faith is exactly the kind of burden on the exercise of religion against which RFRA is meant to protect.

There is no logical or coherent reason why Conestoga and Hobby Lobby being corporations renders insubstantial under RFRA the burden the HHS mandate imposes on the Hahns' and the Greens' exercise of their faith—sin, or subject your businesses to significant penalties. Indeed, to hold that this burden is insubstantial (as demonstrated above) could well lead to absurd and even perverse results. This Court should hold that a substantial burden under RFRA exists when the federal government attempts to coerce business owners to act contrary to their faith by threatening harm to their businesses, regardless of whether the business is incorporated.

III. AN EMPLOYER WHO BELIEVES, BASED ON HIS FAITH, THAT ABORTION IS MORALLY WRONG CAN REASONABLY CONCLUDE THAT SPECIFICALLY PROVIDING OTHERS THE MEANS TO PAY FOR ABORTIFACIENTS IS MORALLY WRONG; MOREOVER, COURTS ARE NOT COMPETENT TO SECOND GUESS AN EMPLOYER'S CONCLUSION CONCERNING WHAT HIS FAITH REQUIRES.

As noted in the Introduction to this Brief, it is reasonable to infer from the district court's decision in *Conestoga*, from Judge Rovner's dissent in *Korte*, and from decisions by courts in other cases, that those courts, at least implicitly, decided that plaintiffs like the Hahns and the Greens are wrong to conclude that complying with the mandate would violate their faith. Of course, those courts were not legally competent to decide that. *See Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981). But in any event, it is perfectly reasonable for those who believe abortion is morally wrong to conclude that providing employees health insurance that covers abortifacients would be morally wrong and thus contrary to their faith.

In reaching his decision that providing his employees abortifacient coverage would be morally wrong, an employer, whether or not he would put it this way himself, would be applying a moral analysis that Catholic moralists commonly refer to as cooperation with evil.[8] While the Hahns and Greens

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[8] *See, e.g.*, William Newton, *Avoiding Cooperation with Evil: Keeping Your Nose Clean in a* [continued next page]

are not Catholic, one need not be a Catholic moral theologian to understand the general moral reasoning that would lead people like the Hahns and the Greens to conclude that it is morally wrong to enable (or make it easier for) employees to obtain abortifacients by providing those employees the specific means to pay for abortifacients.

The general principle of cooperation with (or facilitation of) evil is not difficult to grasp, as a simple example illustrates. Suppose that Baker approaches Able and asks in a way that makes it clear that he is serious, "May I borrow your gun so I can kill my wife?" If Able gives Baker the gun knowing that Baker intends to use it to kill his wife, no one would seriously suggest that Able, though he did not pull the trigger, would not be morally culpable for assisting Baker in killing his wife. The same conclusion—that Able has committed a moral wrong by loaning Baker his gun under these circumstances—would hold even if Baker changed his mind and decided not to kill his wife. Able loaned Baker his gun intending that Baker would have the gun to kill his wife. Able intended to enable Baker to kill his wife, and this intent made it morally wrong for Able to loan Baker his gun (even if Baker

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Dirty World, Homiletic & Pastoral Review (Sept. 21, 2012), *available at* www.hprweb.com/2012/09/avoiding-cooperation-with-evil-keeping-your-nose-clean-in-a-dirty-world/ (last visited Jan. 20, 2014); Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), *available at* http://www.newadvent.org/cathen/ 01100a.htm (last visited Jan. 20, 2014); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), *available at* www.immunize.org/concerns/vaticandocument.htm (last visited Jan. 20, 2014).

ultimately did not commit the murder).

Based on this mode of moral reasoning, employers who morally oppose abortion could reasonably conclude that providing their employees with health insurance covering abortifacients would be morally wrong. Another example helps to illustrate this. Suppose an employer establishes a "Hitman Compensation Fund" for his employees. Any employee who needs a hitman's services may draw from the fund to pay for those services. By creating the fund, this employer has intentionally chosen to provide his employees specifically with access (or more ready access) to murder-for-hire services by providing them the specific means to pay for those services. It is reasonable to conclude that even if no employee takes advantage of the hitman fund, the employer still harbors an intent to see that his employees are able to pay for and thus obtain murder-for-hire services. That is, he harbors an intent to make possible—or, at least more readily achievable—an immoral act.

Few would doubt that an employer who intentionally provides the specific means for his employees to pay for murder-for-hire services would be acting immorally. That would be so even if no employee takes advantage of the hitman fund, because the employer still intended to make available the specific means to pay for those services. It follows that if the federal government were to mandate that all employers establish hitman funds or pay substantial fines, that mandate would impose a substantial burden on the religious exercise of employers who believe that murder is contrary to their religious beliefs.

But if the employer who establishes the hitman fund is acting immorally, it must be reasonable for the employer who, based on his faith, believes abortion is morally wrong to conclude that intentionally providing his employees the specific means to pay for abortifacients (as the HHS mandate requires) is morally wrong. Just as the employer who establishes the hitman fund is intentionally deciding to provide the specific means for his employees to pay for murder-for-hire services, the employer who establishes a fund specifically to reimburse employees who purchase abortifacients is intentionally deciding to provide his employees with the specific means to pay for abortifacients. And as with the employer who establishes the hitman fund, it is reasonable to conclude that even if no employee takes advantage of the abortifacient reimbursement fund, the employer is still acting immorally because of his intent to enable his employees to pay for and thus obtain abortifacients.

If it is reasonable to conclude that an employer who establishes a fund specifically to pay for abortifacients is acting immorally by intentionally facilitating abortifacient use, it is also reasonable to conclude that an employer who in effect establishes such a fund by providing health insurance for his employees that specifically includes coverage for abortifacients is acting immorally by facilitating the evil of abortifacient use. That he is doing this through a contract with a third party does not matter because the end result is the same—both the employer who self-funds his abortifacient fund and the employer who provides insurance coverage for abortifacients have intentionally provided a pool of money for their employees to use specifically to pay

for abortifacients. Each employer has deliberately chosen to make the means of paying specifically for (and thus obtaining or more easily obtaining) abortifacients available to his employees. Thus, this employer could reasonably be thought to share the intent of those who would use the insurance to pay for abortifacients.

Some lower court judges have opined that providing employees with health insurance that specifically covers abortifacients is no different than paying employees wages or salary that they could use to pay for abortifacients. *See, e.g., O'Brien v. United States Dept. of Health and Human Services*, 894 F. Supp. 2d at 1160; *Korte*, 735 F.3d at 715-16 (Rovner, J., dissenting); *Gilardi v. United States Dept. of Health and Human Services*, 733 F.3d 1208, 1237-38 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part). The suggestion is that if an employer does not consider it morally wrong to pay employees a salary that an employee may use to pay for abortifacients, it cannot be a substantial burden on the employer's exercise of religion to require the employer to provide health insurance that covers abortifacients.

There is, however, a significant difference between paying an employee a salary and providing insurance that specifically covers abortifacients:

> The difference is analogous to the difference between giving cash to someone and giving someone, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no essential tie between your gift and that

> particular use of it. In the latter case, you are giving a voucher for the procurement of *a specific and limited range of goods and services*; there is an intelligible link between your gift and the use to which the recipient might put it.[9]

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"[10] so a person who believes abortion is morally wrong could reasonably believe it is morally wrong to provide health insurance that can be used to pay only for those goods and services the policy covers and that specifically covers abortifacients. It is not reasonable to say that an employer who pays his employees wages has any specific intent regarding how the employees spend those wages. It *is*, however, reasonable to say that the employer who provides a means to pay specifically for abortifacients is acting specifically to assist his employees to pay for, and thus obtain, abortifacients. Therefore, that employer manifests an intent to enable his employees to pay for, and thus obtain, abortifacients.

By mandating that employers provide their employees with health insurance that covers abortifacients, the HHS mandate in effect commands those employers to establish a fund to provide employees the specific means to pay for, and thus obtain, abortifacients. It is perfectly reasonable for

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[9] Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2013), http://www.thepublicdiscourse.com/2013/01/7403/ (last visited Jan. 20, 2014).

[10] *Id.*

employers like the Hahns and the Greens to conclude that to provide the mandated coverage would be immoral and therefore contrary to their faith.

Perhaps not all Christians would agree with the conclusion that it would be immoral to provide the mandated coverage. And as noted in the Introduction to this Brief, perhaps some judges find it difficult to believe or understand that employers could conclude that making health insurance covering abortifacients available to employees who may or may not use that coverage is morally wrong. But all that is irrelevant. A religious belief need not be "comprehensible to others" to warrant protection. *Thomas*, 450 U.S. at 715. And as this Court also made clear in *Thomas*, "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences . . . . It is not within the judicial competence to decide [who] more correctly perceives the commands of their common faith." *Id.* at 715-16.

Thomas is particularly on point because *Thomas* involved a plaintiff who like the Hahns and the Greens had to decide whether he was acting inconsistent with his faith by doing something that ultimately assisted activity that his conscience told him was wrong. Thomas, a Jehovah's Witness, worked at a steel foundry and was transferred to a department that fabricated tank turrets. Thomas concluded that he could not work on weapons without violating his faith. He therefore quit his job. *Id.* at 710. At his unemployment compensation hearing, Thomas testified that while "he could, in good conscience, engage indirectly in the production

of materials that might be used ultimately to fabricate arms," he could not work directly on producing arms. *Id.* at 711. Thomas was denied unemployment benefits, and the Indiana Supreme Court, over Thomas's objection that denying him benefits would violate his free exercise rights, ultimately found no free exercise violation and affirmed the benefits denial. *Id.* at 712-13.

In its decision, the Indiana Supreme Court relied largely on what it saw as the inconsistency between Thomas's professed conviction that he could not work directly on armaments and his statement that he would not object to "produc[ing] the raw product necessary for the production of any kind of tank" because he "would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience." *Thomas*, 450 U.S. at 715 (citation omitted). In reversing the Indiana Supreme Court's decision, this Court rejected the Indiana court's reasoning out of hand: "Thomas' statements reveal no more than that he found work [producing raw materials] sufficiently insulated from producing weapons of war. . . . Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

Like Thomas, the Hahns and the Greens have had to decide whether their faith would allow them to perform an act that would assist others in doing what that faith tells them is morally wrong. Like Thomas, the Hahns and the Greens drew a line. As in *Thomas*, "it is not for [the district courts, the courts of appeal, or this Court] to say that the line they drew was an unreasonable one." *Id.*

The Hahns and the Greens sincerely believe

that to comply with the HHS mandate would violate their Christian faith. The HHS mandate thus presents both families with a stark choice: do what you believe is a sin according to your (reasonable) understanding of your religious faith, or subject your business to enormous penalties. This Court's precedent makes clear that being put to that choice substantially burdens the Hahns' and the Greens' exercise of their religion. To hold that it does not would not just be wrong; that holding would usurp the Hahns' and the Greens' right, and all employers' right, to follow their own conscientious judgment in the face of government coercion and would thus nullify for those employers the protection RFRA promises for the free exercise of religion.

CONCLUSION

For the reasons stated above and the reasons stated in Conestoga's and Hobby Lobby's Briefs, this Court should reverse the Third Circuit's decision denying Conestoga's and the Hahns' motion for a preliminary injunction and should remand with instructions to enter a preliminary injunction on behalf of Conestoga and the Hahns, and affirm the Tenth Circuit's decision in *Hobby Lobby*.

Respectfully submitted, this 28th day of January, 2014.

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